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3 UNITED STATES DISTRICT COURT
4 DISTRICT OF NEVADA

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6 ALPS PROPERTY & CASUALTY
7 INSURANCE COMPANY,

Case No. 3:19-cv-00709-MMD-CLB

8 Plaintiffs,

ORDER

9 v.

10 KALICKI COLLIER, LLP; JOHN A.
11 COLLIER; JAMES A. KALICKI; and
12 ROBIN RUMBAUGH, as Trustee of the
13 Edith and James Harley Trust Dated
14 August 31, 1981, Trustee of the Edith and
James Harley Trust – Survivor’s Trust,
and Trustee of the Edith and James
Harley Trust – Residual Trust,

Defendants.

15 **I. SUMMARY**

16 This case is brought pursuant to the Court’s diversity jurisdiction and involves an
17 underlying insurance coverage dispute. Presently before the Court are two motions to
18 dismiss crossclaims brought by Defendant Robin Rumbaugh, in her capacity as Trustee
19 (“Trustee”) of (1) the Edith and James Harley Trust Dated August 31, 1981 (“Harley
20 Trust”), (2) the Edith and James Harley Trust – Survivor’s Trust (“Harley Survivor’s Trust”),
21 and (3) the Edith and James Harley Trust – Residual Trust (“Harley Residual Trust”)
22 (collectively, “Harley Trusts”). (ECF Nos. 26, 30.)¹ In the first motion, Plaintiff ALPS
23 Property & Casualty Insurance Company (“ALPS”) moves to dismiss the crossclaims for
24 lack of subject matter jurisdiction (ECF No. 26). In the second motion, Defendants Kalicki
25 Collier LLP (“the Firm”), John A. Collier (“Collier”), and James A. Kalicki (“Kalicki”)
26 (collectively, “KC Defendants”) move to dismiss the crossclaims as time barred (ECF No.

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28 ¹The Court has considered the relevant responses (ECF Nos. 34, 38) and replies
(ECF Nos. 40, 42).

30). The Court has opted to *sua sponte* examine subject matter jurisdiction as a threshold consideration and will dismiss the crossclaims for lack of jurisdiction over them. The Court will therefore deny the two pending motions as moot.

II. BACKGROUND

The following facts are taken from the complaint (ECF No.2) and crossclaims (ECF No. 10 at 25–52) and certain attached exhibits.

In August 2019, Trustee asserted claims of professional malpractice against KC Defendants (“Claim”). (ECF No. 2-3 at 30–44.) The Claim chiefly stems from KC Defendants’ alleged failure to timely assert Harley Trusts’ claims against a non-party by particularly failing to assess the time period for asserting such claims under California Code of Civil Procedure (“CCP”) § 366.2(a). (*Id.*) The result was that the claims were found to be time barred. (*Id.*)

ALPS commenced the instant action in this Court on November 27, 2019 (“Coverage Action”). (ECF No. 2.) ALPS seeks a declaration that the Lawyers Professional Liability Insurance Policy No. ALPS18622-4 it issued to the Firm for the policy period January 9, 2019 to January 9, 2020 (“Policy”) does not afford coverage to the KC Defendants with respect to the Claim based on the language in the Policy. (*Id.* at 4–5, see also 20–26.) ALPS asserts only two claims: (1) for declaration of non-coverage against all Defendants and that there is no duty to defend or indemnify KC Defendants with respects to the Claim; and (2) for reimbursement on any amount paid in defending the Claim. (*Id.* at 27–35.)

In responding to the complaint on December 26, 2019, Trustee, *inter alia*, asserted multiple crossclaims against KC Defendants predicated on alleged professional negligence as previously asserted in the Claim. (ECF No. 10 at 25–52.) The crossclaims are for: (1) breach of contract; (2) professional negligence—for legal malpractice; (3) professional negligence—related to breach of accounting duties; and (4) declaratory judgment—based on a theory of alter ego liability. (*Id.*)

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ALPS filed its motion to dismiss the crossclaims on January 16, 2020 (ECF No. 26) and KC Defendants filed their motion several days later (ECF No. 30).

III. FED. R. CIV. P. 12(B)(1) LEGAL STANDARD²

Rule 12(b)(1) of the Federal Rules of Civil Procedure allows defendants to seek dismissal of a claim or action for a lack of subject matter jurisdiction. Although the defendant is the moving party in a motion to dismiss brought under Rule 12(b)(1), the plaintiff is the party invoking the court's jurisdiction. As a result, the plaintiff bears the burden of proving that the case is properly in federal court. *McCauley v. Ford Motor Co.*, 264 F.3d 952, 957 (9th Cir. 2001) (citing *McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936)). That burden must be satisfied by a preponderance of the evidence. See *Leite v. Crane Co.*, 749 F.3d 1117, 1121 (9th Cir. 2014) (citation omitted).

Federal courts are courts of limited jurisdiction. *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 374 (1978). "A federal court is presumed to lack jurisdiction in a particular case unless the contrary affirmatively appears." *Stock W., Inc. v. Confederated Tribes of the Colville Reservation*, 873 F.2d 1221, 1225 (9th Cir. 1989) (citation omitted). Thus, "federal subject matter jurisdiction must exist at the time an action is commenced." *Mallard Auto. Grp., Ltd. v. United States*, 343 F. Supp. 2d 949, 952 (D. Nev. 2004) (citation omitted).

Here, ALPS raises a facial attack on the crossclaims. "In a facial attack, the challenger asserts that the allegations contained in a complaint are insufficient on their face to invoke federal jurisdiction." *Safe Air for Everyone v. Myer* ("*Safe Air*"), 373 F.3d

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²While KC Defendants move for dismissal under Fed. R. Civ. P. 12(b)(6), the Court does not provide that standard here because the Court concludes that dismissal is warranted for lack of subject matter jurisdiction. The Court also recognizes that ALPS additionally moves for dismissal under Fed. R. Civ. P. 12(h)(3) (ECF No. 26 at 8) which provides that "[i]f the Court determines at any time that it lacks subject matter jurisdiction, the court must dismiss the action." Fed. R. Civ. P. 12(h)(3).

1 1035, 1039 (9th Cir. 2004).³ The Court assumes the factual allegations of a complaint to
2 be true and draws all reasonable inferences in favor of the plaintiff. *Doe v. Holy See*, 557
3 F.3d 1066, 1073 (9th Cir. 2009) (citations omitted).

4 **IV. DISCUSSION**

5 While ALPS is not a defendant relative to the crossclaims and thus may lack
6 standing to challenge them, the Court has the authority to *sua sponte* consider the matter
7 of its jurisdiction⁴ and will do so in this case. Here, Trustee asserts no independent
8 diversity jurisdiction over the crossclaims and instead solely asserts that the Court should
9 exercise jurisdiction over them pursuant to the federal supplemental jurisdiction statute—
10 28 U.S.C. § 1367. (ECF No. 10 at 25.) To be clear, the crossclaims are alleged against
11 non-diverse parties—Trustee and KC Defendants are both allegedly domiciled in Nevada.
12 In its motion to dismiss, ALPS argues that the crossclaims do not meet the relevant
13 considerations under § 1367(a) and are not authorized under Fed. R. Civ. P. 13(g), which
14 also applies to crossclaims. (ECF No. 26.) The Court’s *sua sponte* determination accords
15 with ALPS’s argument.⁵

16 The Court begins its analysis from the principle that federal courts are courts of
17 limited jurisdiction—and such jurisdiction may not be expanded or overcome by stipulation
18 of the parties. *Matheson v. Progressive Specialty Ins. Co.*, 319 F.3d 1089, 1090 (9th Cir.
19 2003) (per curiam). This Court therefore may exercise jurisdiction over crossclaims only
20 where there is an independent basis for jurisdiction—which has not been asserted here—
21 or they fall under the Court’s supplemental jurisdiction—which has been asserted.

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24 ³“By contrast, in a factual attack, the challenger disputes the truth of the allegations
that, by themselves, would otherwise invoke federal jurisdiction.” *Safe Air*, 373 F.3d at
1039.

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26 ⁴See, e.g., *United Inv’rs Life Ins. Co. v. Waddell & Reed Inc.*, 360 F.3d 960, 966
(9th Cir. 2004) (“[A] district court’s duty to establish subject matter jurisdiction is not
contingent upon the parties’ arguments.”).

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28 ⁵The Court also notes that KC Defendants appear to suggest that subject matter
jurisdiction is a non-issue while arguing that the case should be decided on the time-barred
issue. (ECF No. 30 at 3 n.1.)

1 As to the latter, § 1367(a) provides that district courts have supplemental jurisdiction
2 “over all other claims that are so related to claims in the action within such original
3 jurisdiction that they form part of the same case or controversy under Article III of the
4 United States Constitution.” Subsection (c) of the statute further provides that “district
5 courts may decline to exercise supplemental jurisdiction over a claim under subsection (a)
6 if [, among other things,] the claim substantially predominates over the claim or claims
7 over which the district court has original jurisdiction.” 28 U.S.C. § 1367(c).⁶ Fed. R. Civ.
8 P. 13(g) particularly permits a crossclaim “if the claim arises out of the transaction or
9 occurrence that is the subject matter of the original action [(i.e., there is supplemental
10 jurisdiction)] . . . or if the claim relates to any property that is the subject matter of the
11 original action.”⁷ Notably, the Trustee disavows that the latter part of the disjunctive is at
12 issue. (ECF No. 34 at 21.) Thus, the Court’s analysis simply rests on whether the
13 crossclaims arise out of the same transaction or occurrence as the original claims.

14 Supplemental jurisdiction “is a doctrine of flexibility, designed to allow courts to deal
15 with cases involving pendent claims in the manner that most sensibly accommodates a
16 range of concerns and values.” *Schneider v. TRW, Inc.*, 938 F.2d 986, 993 (9th Cir.
17 1991) (internal quotation and citation omitted). The Ninth Circuit applies a “logical
18 relationship” test “to determine whether two claims arise out of the same transaction or
19 occurrence.” *Kuhn v. Account Control Tech., Inc.*, 865 F. Supp. 1443, 1446 (D. Nev. 1994)

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21 ⁶While Trustee aptly points out that ALPS does not raise the exceptions in § 1367(c)
22 (e.g., ECF No. 34 at 9), the Court considers the section as part of its *sua sponte*
23 determination.

24 ⁷“[T]he general rule [is] that cross-claims are permissive, not compulsory . . .
25 [and] claims for contribution and indemnity contingent upon the outcome of another claim
26 have not been placed in the compulsory category.” *Hall v. Gen. Motors Corp.*, 647 F.2d
27 175, 184 (1980) (citation omitted); see also *Peterson v. Watt*, 666 F.2d 361, 363 (9th Cir.
28 1982) (citing Fed. R. Civ. P. 13(q)) (“[C]ross-claims are permissive rather than
mandatory.”). Logically then the claims asserted in an underlying liability action would not
be compulsory in an action concerning indemnity. Furthermore, this means that
“crossclaims are not waived if a party fails to assert them and they can be pursued in a
separate action.” *Interlabservice, OOO v. Illumina, Inc.*, No.: 15cv2171-KSC, 2017 WL
4217133, at *4 (S.D. Cal. Sept. 20, 2017) (citing *Peterson*, 666 F.2d at 363).

1 (citing *Pochiro v. Prudential Ins. Co. of Am.*, 827 F.2d 1246, 1249 (9th Cir. 1987)). “This
2 flexible approach to Rule 13 problems attempts to analyze whether the essential facts of
3 the various claims are so logically connected that considerations of judicial economy and
4 fairness dictate that all of the issues be resolved in one lawsuit.” *Pochiro*, 827 F.2d at 1249
5 (quotation omitted); see also *Ionian Corp. v. Country Mut. Ins. Co.*, 836 F. Supp. 2d 1173,
6 1187 (D. Or. 2011) (applying the “logical relationship” test in the crossclaim
7 context); 6 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE,
8 FEDERAL PRACTICE & PROCEDURE: CIVIL § 1431 (3d ed. 2010 update) (the
9 “transaction or occurrence standard is expansive and requires
10 a logical relationship between the crossclaim and the original action or counterclaim”);
11 *Interlabservice, OOO v. Illumina, Inc.*, No. 15cv2171-KSC, 2017 WL 4217133, at *5 (S.D.
12 Cal. Sept. 20, 2017) (“[A] logical relationship between claims exists where separate trials
13 on each of the claims would involve a substantial duplication of effort and time by the
14 parties and the courts.”) (internal quotations and citation omitted).

15 Trustee argues that the claims and crossclaims are of a “common nucleus of
16 operative facts” and that the latter arise from the same transaction or occurrence as the
17 Coverage Action in gist because ALPS’s theory for denying coverage purportedly overlaps
18 with the Trustee’s underlying negligence claims. (*E.g.*, ECF No. 34 at 9–10, 16, 18.)
19 Specifically, Trustee claims that both set of claims are grounded on what and when KC
20 Defendants knew about the potential Claim based upon the failure to recognize the statute
21 of repose in CCP § 336.2(a). (*Id.* at 6, 10.) The Court disagrees with Trustee.

22 Trustee’s argument skews the Court’s analysis because, as noted, the Court’s
23 consideration is simply whether the crossclaims are so logically connected to ALPS’s
24 Coverage Action “that considerations of judicial economy and fairness dictate that all of
25 the issues be resolved in one lawsuit.” *Kuhn*, 865 F. Supp. at 1446. While the Coverage
26 Action is undisputedly precipitated by the Trustee’s Claim against KC Defendants, the
27 Court does not find that the two set of claims here are logically or substantially connected
28 to give rise to supplemental jurisdiction. Instead, the Court finds that the allegations in the

1 state-law crossclaims asserted against KC Defendants involve significantly different
2 factual and legal determinations than ALPS's request for declaratory relief. As such, they
3 do not arise out of the same transaction or occurrence.

4 Here, ALPS specifically seeks a declaration that the Policy does not afford
5 coverage for KC Defendants and that ALPS is not required to defend the Claim or
6 indemnify KC Defendants for the same. (ECF No. 2 at 4–5, 20–36.) ALPS's request is
7 allegedly based on, among other things, the Policy's prior knowledge conditions precedent
8 and exclusion, which ALPS argues applies to preclude coverage for the Claim. (*Id.*) Thus,
9 resolution of ALPS's claim will depend on the interpretation and application of the Policy
10 to determine whether ALPS is obligated to defend or indemnify KC Defendants.

11 On the other hand, the determinations related to the crossclaims are distinctly
12 sounded in allegations of negligence (*see generally* ECF No. 10 at 25–52). The
13 crossclaims would precisely require the Court to chiefly examine whether KC Defendants
14 owed certain duties to the Trustee and breached applicable standards of care. Said
15 differently, the crossclaims engender issues that are completely discrete from, and would
16 likely predominate, the key issue of KC Defendants' prior knowledge at issue in the
17 Coverage Action. The crossclaims would therefore require, at minimum, the consideration
18 of additional evidence from that required to determine ALPS's Coverage Action. By
19 extension, there would be greater time and effort involved in resolving the crossclaims
20 despite them being significantly unrelated to ALPS's claims.

21 Accordingly, the Court finds the crossclaims are largely tangential to the Coverage
22 Action. That is, the two set of claims are not so logically related that considerations of
23 judicial economy and fairness dictate that all of the issues between them be resolved in
24 one lawsuit. *Cf. Podiatry Ins. Co. of Am. v. Falcone*, Civ. A. No. 3:10-1106, 2011 WL
25 1750708, at *3 (S.D.W. Va. Feb. 25, 2011) (“Whether or not [claimant’s] injuries stemmed
26 from . . . malpractice has no bearing on whether [the professional liability insurer] can be
27 held responsible” under its policy.); *W. World Ins. Co. v. David Halphin*, No. 12-1397-CV-
28 DGK, 2013 WL 3665251, at *3 (W.D. Mo. July 12, 2013) (“[T]here is little overlap of factual

1 or legal issues between the declaratory judgment action and [claimant's] crossclaim for
2 negligence.”). Therefore, considering its limited jurisdiction, the Court finds that it cannot
3 exercise supplemental jurisdiction over the crossclaims and will *sua sponte* dismiss them
4 from this case. The two pending motions are thereby rendered moot.

5 **V. CONCLUSION**

6 The Court notes that the parties made several arguments and cited to several cases
7 not discussed above. The Court has reviewed these arguments and cases and determines
8 that they do not warrant discussion as they do not affect the outcome of the issues before
9 the Court.

10 It is therefore ordered that the crossclaims are dismissed from this action because
11 the Court finds *sua sponte* that it lacks jurisdiction over them.

12 It is further ordered that the pending motions to dismiss the crossclaims (ECF Nos.
13 26, 30) are denied as moot.

14 DATED THIS 10th day of April 2020.

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17 MIRANDA M. DU
18 CHIEF UNITED STATES DISTRICT JUDGE
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